

SOAH DOCKET NO. 582-06-1502
TCEQ DOCKET NO. 2006-0195-AIR

APPLICATION OF
OAK GROVE MANAGEMENT
COMPANY, LLC FOR
PROPOSED AIR PERMIT
NO. 76474 AND PSD-TX-1056

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BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE ADMINISTRATIVE LAW
JUDGES' PROPOSAL FOR DECISION AND ORDER

TO HONORABLE ADMINISTRATIVE LAW JUDGES CAROL WOOD AND TOM
WALSTON:

COMES NOW the Executive Director (ED) of the Texas Commission on Environmental
Quality (TCEQ or Commission) and files the Executive Director's Exceptions to the
Administrative Law Judges' (ALJs) Proposal for Decision (PFD) and Order and in support
thereof shows the following:

I. INTRODUCTION/BACKGROUND

On February 21, 2006, the TCEQ Executive Director issued a preliminary decision and
the draft permit for the Oak Grove Steam Electric Station. On February 22, 2006, the applicant
requested this case be directed referred to the State Office of Administrative Hearings (SOAH)
for a contested case hearing on whether the application complies with all applicable statutory and
regulatory requirements. SOAH conducted the hearing from June 13 through June 20, 2006.
Evidence in the record reflects fact issues regarding the appropriate BACT emission rates for
nitrogen oxides (NO_x) and mercury (Hg). In the PFD, issued on August 23, 2006, the ALJs
focused on the technical practicability of the equipment proposed to control the NO_x and
Mercury emissions, and found that the Applicant failed to prove by a preponderance of the
evidence that its BACT proposals for controlling NO_x and mercury emissions are technically

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practicable and would achieve the performance standards contained in the application and draft permit.¹

II. ANALYSIS

Prior to receiving authorization to construct and operate a source of air contaminants, which in this case includes a New Source Review (NSR) and Prevention of Significant Deterioration (PSD) Permit, the applicant must demonstrate that the application and draft permit meet all of the applicable statutes and regulations. This demonstration is based on the representations the applicant submits in the application, including representations regarding best available control technology (BACT) and emissions limitations. Upon issuance of the permit, the representations in the application become conditions upon which the permit is issued.²

In processing a TCEQ NSR permit application, the permit engineer will evaluate those representations, gather any additional information necessary to review the project through formal Requests for Information, and then conduct an independent review of the proposals using engineering principles and agency experience concerning the technical practicality and reasonableness of the emission reduction option proposed by the applicant.³ "Technical practicability is established through demonstrated success of an emission reduction option based upon use, and/or *engineering evaluation* of a new technology." (Emphasis added)³ While the engineering analysis of technically practical control options does not insure there is no risk to the applicant that the control that represents BACT will always operate as anticipated, the BACT process is intended to promote controls to lower emissions that are technically practicable and

¹ SOAH Proposal For Decision at 2.

² 30 Tex. Admin. Code § 116.116(a)(1).

³ Excerpt is taken from the TCEQ Guidance Document, *Evaluating Best Available Control Technology (BACT) in Air Permit Application*. Oak Grove Ex 15 at 5.

economically reasonable.⁴ In addition, to ensure enforceability of the proposed BACT performance, the applicant must propose a performance demonstration to ensure that the emission reduction proposal will perform as represented on an ongoing basis.⁵ The BACT proposal and analysis may involve, inter alia, for up to a three-tiered review, the review of new or untested technology, or the use of existing technology employed in an innovative format. Because this analysis is presented as representations, if there is any question regarding the ability of the applicant to meet BACT, it is common practice for the Air Permits Division (APD) to include in the permit special conditions requiring the applicant to test its process (e.g., stack testing) to verify it meets those representations.⁶ Based on this information, the permit reviewer evaluates the applicant's analysis and makes a case-by-case determination of whether the proposal satisfies 30 TAC Chapter 116 BACT requirements.⁷ In summary, the air permitting process is designed to promote the innovation of technology in controlling and lowering emissions and, therefore, allows for the approval of proposed BACT that, in the application is representatively feasible but not fully demonstrated. In such an instance, the permit will include additional conditions for the applicant to conduct testing once the source is constructed and operated to demonstrate compliance with all of the representations made during the application process. In this case, the TCEQ permit engineer determined that the use of SCR for NO_x reduction and the use of activated carbon for Mercury control is technically feasible, predicated in part on the operational effectiveness and subsequent performance testing.

⁴ *Id* at 21.

⁵ *Id* at 16.

⁶ *Id.* at 12 and 13.

⁷ *Id.*

This process is supported by federal and state rules, agency policy, and air permitting guidance documents. For example, Federal New Source Performance Standards applicable to this permit, address the requirement for performance testing within 180 days of initial startup.⁸ In addition, TCEQ rules state that in order to be granted a permit, amendment, or special permit amendment, the application must include a performance demonstration that facility will achieve the performance specified in the permit application.⁹ This rule also provides that the applicant may be required to submit additional engineering data after a permit has been issued in order to further demonstrate that the proposed facility will achieve the performance represented in the permit application.¹⁰ In addition, dispersion modeling, monitoring, or stack testing may be required.¹¹ Finally, when addressing issues of reliability, TCEQ's BACT guidance document entitled *Evaluating Best Available Control Technology (BACT) in Air Permit Applications* states: "If there is concern that the represented performance will not achieve over the entire operating range, or if there are a large number of parameters that may affect performance, continuous emission monitors or periodic testing may be appropriate."¹²

In the case of the Oak Grove Steam Electric Station (OGSES) draft permit, testing is utilized as a method of post-permit issuance, compliance demonstration. The draft permit

⁸ 40 CFR § 60.8 Performance tests. (a) Within 60 days after achieving the maximum production rate at which the affected facility will be operated, but not later than 180 days after initial startup of such facility and at such other times as may be required by the Administrator under section 114 of the Act, the owner or operator of such facility shall conduct performance test(s) and furnish the Administrator a written report of the results of such performance test(s).

⁹ 30 TEX ADMIN CODE § 116.111 (a)(2)(G).

¹⁰ *Id.*

¹¹ *Id.*

¹² Oak Grove Ex 15 at 13. In reaching their determination that the applicant has not met their burden in this case, the ALJs rely primarily on a questions posed in the BACT guidance Document such as "Has the proposal been demonstrated to work based on actual operation." However, the BACT guidance document also addresses situations when an emission reduction option is not actually demonstrated in practice. The Frequently Asked Questions portion of the BACT guidance document states that an emission reduction option does not necessarily have to be actually demonstrated in practice to be considered a possible option in BACT analysis, but would need to be technically feasible based on engineering evaluation.

contains two specific provisions that address this process. First, Special Condition No. 49 addresses application of 30 TAC 116.111(2)(G). It states in pertinent part, "For each PC [pulverized coal] boiler, if the permit holder is unable to demonstrate compliance with the PC Boiler performance standards identified in Special Condition No. 12A.[referring to the 0.08 lb/MMBtu rate for NO_x and the .0000092 lb/MMBtu rate for mercury] within 180 days of initial startup, then the permit holder may request additional time for an emissions study to mitigate emissions from the unit... . Mitigation studies may be requested by the permit holder to evaluate and implement additional efforts to mitigate the emissions of NO_x, NH₃ or Hg."¹³ As a condition of this provision, the applicant must submit a report to the TCEQ Air Permits Division and regional office summarizing the effort utilized to mitigate emissions and the resulting emission rates resulting from the study as well as a listing of action that will be undertaken by the permit holder to achieve the performance standard listed in Special Condition No. 12, referring again to the 0.08 lb/MMBtu rate for NO_x and the .0000092 lb/MMBtu rate for mercury.¹⁴

Second, Special Condition No. 50, also referred to as the "NO_x Optimization clause", requires the applicant to conduct a study of the operational capability of the Selective Catalytic Reduction (SCR) system during the two years following initial demonstration of compliance testing of the first PC boiler placed into operation.¹⁵ Ultimately, the applicant is required to submit a request to alter the permit to a lower limit if the study demonstrates that a lower rate is

¹³ Oak Grove Ex 6 at 63.

¹⁴ *Id.*

¹⁵ *Id.* at 64.

justified based on SCR performance with typical and expected maintenance and operational effects.¹⁶

Moreover, there is little or no evidence in the record to indicate that any of the parties asserted that the technology is not technically practicable. Neither the Protestants, nor the Office of Public Interest Counsel (OPIC), raise the issue of technical practicability of SCR with a Texas lignite-fired system. Rather, the Protestants' only arguments refer to the emission limits and the Applicant's choice of lignite as a fuel source.¹⁷ In fact, the Protestant's Closing Arguments did not address BACT at all. As for the OPIC, the issue of BACT for NO_x using lignite was addressed, however, only in the context that the OPIC questioned whether or not the limit was BACT since it was not the same, (as low as) that of other recently permitted facilities. The PIC goes on to admit that the record reflects a situation where the emission rates in the draft permit are achieved, or even bettered.¹⁸ In OPIC's Reply to Closing, the focus, again, was on the emission limits and not the technical practicability of SCR. These positions of the parties further support that there were no disputed issues of fact regarding the viability of SCR as a post-combustion control technique.

In conclusion, the ALJs reasoned that the applicant failed to establish by a preponderance of the evidence that: the OGSES will meet the NSPS, its modeling reflected actual emission of NO_x and Mercury, and the OGSES will comply with the NAAQS and PSD increments. For their reasoning, the ALJs concluded that the applicant did not meet its burden to show that the source will not cause or contribute to a condition of air pollution. The ED understands this decision to

¹⁶ *Id.* at 64.

¹⁷ Protestant's Rule 194 Disclosures, Response 3, page 3. See Protestants Replies to Closing Arguments at 2-4.

¹⁸ Office of Public Interest Counsel's Closing Arguments at 6.

be predicated solely on their conclusion that the applicant did not meet its burden regarding technical practicability of NO_x and Mercury controls. However, because the ALJs' findings and conclusions regarding technical practicability of NO_x and Mercury controls fails to take into account the entirety of applicable rules and TCEQ guidance regarding BACT analysis, it would follow that the evidentiary record would support findings and conclusions other than those reached by the ALJs regarding compliance with the NAAQS, PSD increments, ESLs, and ultimately whether the proposed facility will cause or contribute to a condition of air pollution.

III. EXCEPTIONS TO THE FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. FINDINGS OF FACT

1. The ED excepts to Findings of Fact No. 47 and respectfully requests that the finding be deleted and replaced by a Finding of Fact which states "The average NO_x coming out of the 100% Texas lignite coal-fired boilers is currently about 2.0."
2. The ED respectfully requests the addition of Finding of Fact No. 47A: The 3rd Quarter 2005 EPA acid rain database figures indicate that the average of the three 100% lignite-fired boilers in Texas was 0.185 lb/MMBtu.
3. The ED excepts to Findings of Fact Nos. 49, 74-76, 79b, and 80-81 and respectfully requests that the phrase "failed to establish by a preponderance of the evidence" in each finding should be changed to read "has presented evidence in support of its representation."
4. The ED excepts to Findings of Fact Nos. 73 and 82 and respectfully requests that the phrase "failed to prove" in each finding should be changed to read "has presented evidence in support of its representation."
5. The ED excepts to Findings of Fact Nos. 79c and respectfully requests that the phrase "failed to establish" in each finding should be changed to read "has presented evidence in support of its representation."
6. The ED excepts to Findings of Fact Nos. 79 and respectfully requests that the phrase "unproven" be deleted.

7. The ED respectfully requests the addition of Finding of Fact No. 75A: The representations made by Oak Grove regarding the proposed controls and associated emission rates for NOx and mercury are predicated upon compliance demonstrations as required in Special Conditions 49 and 50 of the draft permit, TCEQ rules in 30 TAC ch. 116, and federal NSPS in 40 CFR part 60.

B. CONCLUSIONS OF LAW

1. The ED excepts to Conclusions of Law Nos. 7-16 and respectfully requests that the phrase "failed to prove by a preponderance of the evidence" in each conclusion should be changed to read "has presented evidence in support of its representation."
2. The ED respectfully requests the addition of Conclusion of Law No. 6A: As provided by 116.116(a)(1), upon issuance of the permit, any representations made in the application become conditions upon which the permit is issued.
3. The ED respectfully requests the addition of Conclusion of Law No. 15A: Based upon the above findings of fact and conclusions of law, upon issuance of the permit, Oak Grove must undertake the compliance demonstrations required by the permit, and TCEQ and Federal rules.

IV. CONCLUSION AND PRAYER

The Executive Director respectfully requests that the Commissioners issue a Proposal for Decision, confirming through findings of fact and conclusions of law, based on the totality of evidence available to the Commissioners, that the draft permit contains adequate provisions to ensure compliance with all applicable statutory and regulatory requirements necessary for permit issuance.¹⁹ If the Commission finds that the emissions of the proposed facility will contravene the statutory provisions or the intent of the Clean Air Act, the Executive Director requests that in accordance with statutory regulations regarding preconstruction permitting, the Commission set

¹⁹ TEX. HEALTH AND SAFETY CODE § 382.0518(b).

out in a report to the applicant its specific objections to the submitted plans of the proposed facility.²⁰

Respectfully Submitted,

Texas Commission on Environmental Quality

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²⁰ TEX. HEALTH AND SAFETY CODE § 382.0518(d).

CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGES PROPOSAL FOR DECISION AND ORDER have been served on the following in the manner indicated below on this 12th day of September, 2006.

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